construe, as a common enterprise, the framework of fundamental rights protection in Europe. The temptation for a court to entrench itself in the discourse of unilateral primacy might be seductive, as is the lure of living a life under false illusions, with all its dubious benefits, but with all the risks as well.

At the end of Albee's play, George walks next to Martha as he quietly sings to himself "who's afraid of Virginia Woolf?", to which Martha replies, "I am, George... I am". With the entry into force of the Charter, the ECJ and its national counterparts can sing this song over and over. And if they all take the Charter seriously, as the ECJ has succeeded in doing in its first judgments to date, they could all reply, without a hint of doubt, "Not me, George... not me".

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ACCESSION OF THE EU TO THE ECHR: THE RATIONALE FOR THE ECJ'S PRIOR INVOLVEMENT MECHANISM

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1. Introduction

Pursuant to Article 6(2) TEU, the Union "shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". The Treaty of Lisbon actually mandates the institutions to join the ECHR. The formula "shall accede" is arguably a qualified commitment of means, rather than a genuine obligation of result: the finalization of the EU accession indeed requires several conditions to be met.[1] Mirroring the EU provision, in 2010 a new Article 59(2) ECHR ("the European Union may accede to this Convention") came into force. It lays out the Convention's legal basis for the first non-state entity to join the Council of Europe's judicial system for the protection of human rights.[2]

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1. Strictly speaking the wording *shall accede* cannot be considered as a pure obligation to join, as is argued; cf. Benoit-Rohmer, "L'adhésion de l'Union à la Convention européenne des droits de l'homme", 19 *Journal de droit européen* (2011), 285; Jacqué, "L'adhésion à la Convention européenne des droits de l'homme", <www.europarl.europa.eu/document/activities/cont/>, para 1, who envisages an action for failure to act should the relevant institution not join the ECHR. The accession actually requires an agreement with the Council of Europe and its 47 parties (20 not being EU Member States), aimed at defining a set of conditions which must be negotiated beforehand. Indeed, the accession agreement is subject, on the one hand, to a revision of the ECHR and, on the other hand, to specific conditions laid down in Art. 6(2) TEU ("the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such Accession shall not affect the Union's competences as defined in the Treaties"), as well as in Protocol No. 8 annexed to the Treaties. It seems worth recalling that the Treaty establishing a Constitution for Europe used a softer wording: "the Union shall seek accession ...". On 4 July 2013, the ECJ was requested to rule on the compatibility with the Treaties of the Draft agreement as negotaited up to April 2013 (see *infra* section 4); Opinion 2/13, pending.

2. Protocol 14 (adopted in 2004) to the ECHR has been eventually ratified by Russia and entered into force on 1 June 2010.

The accession agreement has to tackle a number of issues. Several adaptations of the ECHR system are needed, whilst account must be taken of the specificity of the EU legal order. One of the most controversial questions is how to integrate two international judicatures in a harmonious and efficient combination, without affecting the Strasbourg Court's power to have the last say in a given case of alleged violation of Convention rights calling into question an EU law provision. In this regard, a prior involvement mechanism of the European Court of Justice has been proposed in situations when the alleged violation involves national judicial proceedings. The present paper focuses on this issue, with a twofold aim. It seeks to demonstrate that the prior involvement mechanism does match both the ECHR's features (section 5), and the precise conditions imposed by EU primary law on the accession process (section 6). It further argues that the prior involvement rule does not require a revision of the EU Treaties (section 7). Conclusions will then be drawn (section 8). As a necessary point of departure, some of the legal implications of the accession will be outlined (section 2); a description is offered of the main issues raised by the EU accession (section 3), and the prior involvement mechanism, as it stands in the current Draft accession agreement (section 4).

2. The legal implications of the EU accession: An outline

The implications of Article 6(2) TEU are manifold. First, the ECHR is deemed to acquire a new legal status within the EU legal order. Initially, it was a *special source of inspiration* for the ECJ construction on human rights, and then an element of direct referral.[3] After accession, the ECHR will be a formally binding source of law.[4] Second, that provision fills the competence gap highlighted by Opinion 2/94 – a systemic lacuna in the scheme of attributed powers which the "flexibility clause" could not fix either, as the ECJ stated.[5]

3. Case 222/84, *Johnston*, [1986] ECR 1651, para 18; Joined Cases 46/87 & 227/88, *Hoechst* v. *Commission*, [1989] ECR 2859, para 13; Case C-274/99 P, *Connolly* v. *Commission*, [2001] ECR I-1611, para 37; Case C-540/03, [2006] ECR I-5769, paras. 36 and 52; C-307/05, *Festersen*, [2007] ECR-1129, paras. 35–36. Simon, "Des influence réciproques entre CJCE et CEDH:: 'Je t'aime, moi non plus'?", available at: <www.cairn.info/revue-pouvoirs-2001-1-page-31.htm>.

4. For a different approach, see Potteau, "Quelle adhésion de l'Union européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?", 77 R.G.D.I.P. (2011), 94–95.

5. In Opinion 2/94, [1996] ECR I-1795, paras. 34–35, the ECJ made it clear that no Treaty provision conferred any general power to enact rules on human rights or to conclude international conventions in this field. In the Court's eyes, accession implied a substantial change in the Community system for the protection of human rights, and entailed the entry of the Community into a distinct international institutional system, as well as the integration of all the provisions of the ECHR into the Community legal order. The Opinion showed a competence gap that could only be solved through a Treaty amendment.

Third, the EU's prospective membership of the ECHR, as set out by primary law,[6] would not depend upon another (after Opinion 2/94) prior revision of the EU Treaties. Fourth, the accession would be comprehensive – neither primary law en bloc,[7] nor a given area of EU activity may be excluded.[8] In the same vein, any form of accession not implying the jurisdictional control of the Strasbourg Court (hereinafter, also ECtHR) would hardly be conceivable.[9] By and large, a carve-out aimed at delimiting the EU's accession actually draws no evident ground in Article 6(2) TEU. This is not to say, however, that the EU may not express some reservations in accordance with the Strasbourg Court jurisprudence,[10] when signing or, at the latest, ratifying the accession agreement, though these can only be quite limited in scope. In accordance with Article 57 of the ECHR, the EU will be permitted to unilaterally restrict the obligation arising under the Convention provided that its reservations have no open end or general character.

Once achieved, the EU's accession will foster the protection of human rights in Europe. Certainly, its legal order is already founded on the inviolable and inalienable rights of natural and legal persons.[11] Pursuant to Article 6 TEU, the Charter has the same legal value as the Treaties, and human rights as general principles are reaffirmed.[12] The ECJ's key role in ensuring a high level

6. *Infra*, section 5.

7. Tulkens, "Les aspects institutionnels de l'adhésion de l'UE à la CEDH", 81 *L'Observateur de Bruxelles* (2010), 19, 21; Lock, "EU accession to the ECHR: Implications for judicial review in Strasbourg", 35 EL Rev. (2010), 777, 783; Gragl, "Strasbourg's external review after the EU's accession to the European Convention on Human Rights: A subordination of the Luxembourg court", 17 *Tilburg Law Review* (2012), 32, 53.

8. Potteau, op. cit. *supra* note 4, 89, points out that the French Senate pleaded for the exclusion of CFSP acts from the scope of the EU accession.

9. The Steering Committee for Human Rights mentioned this option on a theoretical basis and from a different perspective, in 2002: Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2, 53rd meeting, 25–28 June 2002, 14.

10. Baratta, "Should invalid reservations to human rights treaties be disregarded?", 11 EJIL (2000), 413; Pellet and Müller, "Reservation to human rights treaties: Not an absolute evil …", in Fastenrath et al. (Eds.), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma* (OUP, 2011), p. 521, for the relevant case law and bibliography therein cited.

11. Arts. 2 and 6 TEU.

12. Political institutions act daily to streamline human rights: Communication on a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010)573 final. In this document, the Commission stresses that the EU must be exemplary when protecting Charter fundamental rights (at 4). It intends to ensure that Member States respect the Charter when implementing EU law, even through infringement procedures (at 9). It is worth remembering that on 30 March 2007 the EU signed its first major international

protection of human rights can hardly be doubted, once it realized – in the late 1960s – that the exercise of (progressively increasing) competences could bring about violations of fundamental rights.[13] Yet the accession will confer on individuals the right to lodge applications *directly against* the EU. The current situation of *vicarious* and *indirect* liability of Member States will no longer stand.

It is true that the Strasbourg Court has ruled out the argument according to which the transfer of competences to a supranational organization excludes States' liability under Article 1 ECHR, both for the consequences of the treaty establishing the organization and the acts adopted by that organization. After *Cantoni*[14] and *Matthews*,[15] the ECtHR barely addresses that *ratione personae* contention often suggested by the EU State Governments sued for EU related cases. The implied assumption is that, leaving aside some civil servants disputes,[16] the Strasbourg Court has competence to estsblish the liability of the Member States, irrespective of whether this is of a *collective*[17] or

human rights treaty – the UN Convention on the Rights of Persons and Disabilities. The EU ratified the treaty on 23 Dec. 2010 (De Búrca, "The EU in the negotiation of the UN disability convention", 35 EL Rev. (2010), 174).

13. Case C-305/05, *Ordre des barreaux francophones et germanophone and Others*, [2007] ECR I-5305, paras. 26, 29; Joined Cases C-402 & 415/05, *P Kadi and Al Barakaat International Foundation* v. *Council and Commission*, [2008] ECR I-6351, paras. 283, 308; Joined Cases C-92 & 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert* v. *Land Essen*, [2010] ECR I-11063, para 44.

14. Arguing from *Cantoni* v. *France*, Appl. No. 17862/91, judgment of 15 Nov. 1996, ECHR Reports 1996-V 1614, if the implementing national measure is discretionary, the act is attributed to the EU Member State. Ultimately, in this case the Strasbourg Court did not find a violation of the ECHR.

15. In *Matthews* v. *The United Kingdom*, Appl. No. 24833/94, judgment of 18 Feb. 1999, ECHR 1999-1, 34–35, the Strasbourg Court held that it had no competence to challenge the acts of the Union since the EU was not a Contracting party. However, the "Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer" (para 32). As to an alleged violation issuing from international instruments which were freely entered into by the United Kingdom, the Court noted that these instruments could not be challenged before the ECJ given their primary law nature. Then it added that the United Kingdom, "together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty" (para 33).

16. *See infra*, in this section.

17. It is a collective liability if there are no implementing measures required from Member States under EU law: e.g. *Guérin Automobiles* v. *15 Etats de l'Union européenne*, Appl. No. 51717/99, judgment of 4 July 2000; *DSR-Senator Lines GmbH* v. *15 Member States of the EU*, Appl. No. 56672/00, judgment of 10 March 2004; *SEGI and Gestoras Pro-Amnistia* v. *15 Member States of the EU*, Appl. No. 6422 & 9916/02, judgment of 23 May 2002; *Emesa Sugar N.V.* v. *Netherlands*, Appl. No. 62023/00, judgment of 13 Jan. 2005. These rulings have in common that the Strasbourg Court did not address the *ratione personae* issue related to the EU act which was at the origin of the dispute. It stated instead that the plea was not covered by the

individual[18] nature. Currently they are liable either for violations committed by the supranational institution to which they have transferred powers or for their own implementing acts, namely when they are discretionary.

On the whole, the number of cases in which the Strasbourg Court has actually established that EU States infringed Convention rights in EU related affairs, is relatively low. Nonetheless, accession can be considered a step forward even from their standpoint. EU States may not like being held (jointly or individually) liable for conduct over which, in some cases at least, they exercised no effective or factual control or, more generally, for an act that does not strictly relate to their jurisdiction within the meaning of Article 1 ECHR. From the viewpoint of a single Member State, such a situation may occur for acts or conduct carried out by EU agents, but also for the conduct of an organ of another Member State, exercised under the control of the supranational organization at the disposal of which it has been placed. As a matter of policy, it is unconvincing to consider an EU State responsible for conduct over which it may have little control or no control at all. These issues would however be a thing of the past. After accession, a specialized European judiciary will ensure an *external* and *direct* review of EU law (primary or secondary) provisions, as well as acts of the institutions (third degree level, such as delegated or implementing acts) or any other kind of acts adopted by bodies or entities producing legal effects *vis-à-vis* individuals.

A further gap in the external judicial review will be filled as to the disputes concerning labour law relationships between the EU and its employees: they too will fall within the power of the Council of Europe judicature.[19] Hence, the value of accession is not merely symbolic and aesthetic,[20] even though its

Convention's guarantees. It is worth mentioning that in the realm of competition law it is claimed that the Commission resists the full force of fundamental rights: Editorial comments, "Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights", 48 CML Rev. (2011), 1405.

18. An individual liability arises when the EU Member State adopted a concrete implementing act outside the scope of the EU obligation: e.g. *M.S.S.* v. *Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011, 338–340.

19. As is known, the Strasbourg Court actually denied the responsibility of the members of an international organization in situations where they are not involved, directly or indirectly, in the act which was at the origin of the alleged breach: *Boivin* v. *34 State members of the Council of Europe*, Appl. No. 73250/01, decision of 9 Sept. 2008. In this case the ECtHR stated that, unlike *Matthews* and *Cantoni*, in which the State or States concerned had been involved directly or indirectly, the applicant cannot be said to have been "within the jurisdiction" of the respondent States for the purposes of Art. 1 of the Convention. Likewise, *Connolly* v. *15 Member States of the EU*, Appl. No. 73274/01, decision of 9 Dec. 2008. In both cases, the Court held that the applications were inadmissible *ratione personae*.

20. Weiler, *Certain Rectangular Problems of European Integration* (Volume I), European Parliament. Political Series W-24, Luxembourg, 1997, 6–7.

political significance should not be underestimated.[21] Being part of the Strasbourg system will indeed enhance the credibility of the EU, particularly when promoting human rights and democracy in its external relations and Common Foreign and Security Policy activities.[22] Some arguments on the asserted rhetoric and instrumental use of human rights by the EU[23] are deemed to lose strength. Thus, accession will improve protection of human rights through an external control, which up until now was absent.[24] It comes as no surprise that the European Parliament strongly endorses accession.[25]

3. The main issues raised by the accession

Since the very entry into force of the Treaty of Lisbon, EU accession to the ECHR has been on the Council agenda. On 4 June 2010 that institution approved a decision authorizing the Commission to negotiate an accession agreement. On 7 July 2010 the Commission launched negotiations. The process has almost come to an end at the time of writing: a draft agreement exists.[26] First and foremost, it raises many complex legal issues.[27] The EU is

21. According to the Commission, the accession "will introduce an additional judicial control in terms of protecting fundamental rights in the EU. Accession will further embed a common culture of fundamental rights in the EU, and show that the EU puts its weight behind the Strasbourg system of rights protection. It will also ensure that there is a harmonious development of the case law of the Court of Justice and the European Court of Human Rights", *Report from the Commission – 2010 Report on the Application of the EU Charter of Fundamental Rights*, 11–12.

22. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005), *passim*.

23. Williams, *EU Human Rights Policies: A Study in Irony* (OUP, 2005), *passim*, claims that in the EU the general principle of respect for human rights is based on a double standard: internally human rights are contingent since scrutiny is erratic and even casual, whilst externally, the EU approach is completely different because human rights are broad in concept, and collective notions of rights are accepted and promoted. For a critical evaluation of human rights as applied in the EU see also Amnesty International, *The EU and Human Rights: Making the Impact on People Count* (2009) www.amnesty.eu/static/documents/2009/EU_and_Human_Rights_Making_the_Impact_on_People_Count.pdf.

24. Scheeck, "The relationship between the European Courts and integration through human rights", 65 ZaöRV (2005), 837, 846.

25. European Parliament resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status (2002/2139(INI), O.J. 2003, C 300E/436.

26. Its course and progress can be detected from a number of documents the Council of Europe, setting out some provisional results, including several draft texts of the accession agreement, available on <hub.coe.int/web/coe-portal/european-union>. The agreement is the subject of a request for an Opinion by the ECJ under Article 218(11) TFEU, see *supra* note 1.

27. For a general overview of the issues raised by the EU accession, see De Schutter, "Les aspects institutionnels de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", Note à l'attention de la Commission institutionnelle du Parlement européen en vue de l'audition du 18 mars 2010, <www.europarl.europa.eu/document/activities/cont/201003/>, *passim*; Benoit-Rohmer, op. cit. *supra* note 1, 385; Gaja, "Accession to the ECHR", in Biondi, Eeckhout and Ripley (Eds.), *EU After Lisbon* (OUP, 2012), p. 180; Lock, "End of an epic? The draft agreement on the EU's accession to the ECHR", 31 YEL (2012), 162.

not a State, contrary to all other contracting parties to the ECHR and its accession entails far more difficulties than a unilateral declaration of accession made by a State entity. The accession agreement is expected to contain amendments to the ECHR and its Protocols, as it was rightly outlined when the new Article 59(2) ECHR was shaped[28] and even earlier, in 2002, by the Steering Committee for Human Rights.[29] They are procedural, formal and substantial adaptations. Administrative issues concerning the contribution of the EU to the budget of the Council of Europe, not to mention the EU participation in the bodies of ECHR, have been dealt with.

The scope of the accession has been defined, covering the Convention and the Protocols ratified by all EU States. The agreement has to harbour the basic features of the ECHR as they stand. According to Article 6(3) TEU and Protocol No 8, the accession notably requires, on the one hand, that the *specificity* of the EU[30] be taken into account, and on the other hand that its complex system of division of competences be preserved.

The autonomy of the EU legal order should not be affected.[31] In that respect, the accession agreement is deemed to uphold the exclusive competence of the ECJ with regard to the disputes between EU Member States, and those between them and the institutions, to the extent that they fall within the scope of the EU Treaties.[32] To put it differently, these disputes should be outside the scope of the Accession Agreement, as Article 3 Protocol No 8 seems to imply.

28. See the explanatory report to Protocol No. 14, 101.

29. Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, cited *supra* note 9.

30. Mengozzi, "Les caractéristiques spécifiques de l'Union européenne dans la perspective de son adhésion à la CEDH", (2010) Dir. Un. Eur., 231.

31. Potteau, op. cit. *supra* note 4, 100; Lock, op. cit. *supra* note 7, 781; Lock, "Walking on a tightrope: The draft accession agreement and the autonomy of the EU legal order", 48 CML Rev. (2011), 1025; Gragl, op. cit. *supra* note 7, 32.

32. Potteau, op. cit. *supra* note 4, 97–98. Since primary law principles stand in the way of conferring the ECJ's exclusive jurisdiction to an international court by way of agreement concluded by the EU (Case C-459/03, *Commission* v. *Ireland*, [2006] ECR-I, 4635, para 123, and the Opinion of A.G. Poiares Maduro in that case, para 41), one may query whether the accession agreement would make it clear that the disputes in question do not fall within the jurisdiction of the ECtHR pursuant to Art. 3 Protocol No 8 (Tizzano, "Les Cours européennes et l'adhésion de l'Union à la CEDH", (2011) Dir. Un. Eur., 35). This issue is different from that concerning a complaint to the EU Commission which does not stand in the way of an application lodged before the Strasbourg Court: *Karoussiotis* v. *Portugal*, Appl. No. 23205/08, judgment of 1 Feb. 2011, paras. 59–77. According to the ECtHR, the infringement procedure under EU law cannot be equated to an individual application pursuant to Art. 34 ECHR.

One can even argue that that power to adjudicate pertains to the founding principles of the EU supranational system which accession is expected to preserve.[33] Certainly, the introduction of an innovative form of joint participation – the *co-respondent mechanism* – is essentially aimed at tackling the situation in which an EU law provision or measure is implemented by its Member States, whether or not the latter enjoy some room for discretion.[34] But again this mechanism does not seem to be conceived for disputes involving Member States and EU institutions.

Finally, it is necessary to shape a sound relation between the two Courts aimed at preserving both the powers and final jurisdictional role of the Strasbourg Court, as well as the key functions of the ECJ in the European integration process. In this regard, the so-called "prior involvement of the ECJ" has been a controversial element of the negotiation.[35] The issue was debated soon after the entry into force of the Treaty of Lisbon, at first receiving quite a cautious support in Brussels given its peculiarity. However, the mechanism, as it presently stands, is designed to allow the priority of the *internal* control over the Strasbourg Court's *external* supervision. In other words, the Luxembourg Court will rule on the validity of an EU provision, act and measure, as well as on the interpretation of primary law, when the issue of their compliance with the Convention rights is still pending in Strasbourg.

The prior involvement mechanism raises at least three issues to be assessed from the standpoint both of the ECHR and the EU legal order. First, one may query whether it contradicts the precise substantive nature of the ECHR's judicial control. Second, it is necessary to seek its relevant justification within the EU legal framework. Third, if these hurdles are passed, the argument that its introduction would require a revision of the EU Treaties, needs to be

33. Szymczak, "Arx tarpeia capitol proxima . . . Bref retour sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", 552 *Revue de l'Union européenne* (2011), 641, argues that the accession might even adversely affect the well-established judicial principle of primacy of EU law over national law.

34. The fact that the co-respondent mechanism is applied only when an EU law provision is implemented by its Member States clearly entails that the EU cannot be involved in cases in which EU law does not govern the relationship between the ECHR and the legal systems of the Member States (see e.g. Case C-571/10, *Kamberaj*, judgment of 24 Apr. 2012, nyr, para 59). However, the ECJ seems sometimes to construe the very notion of a national law implementing a secondary EU provision in quite a broad way (Case C-617/10, *Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr, paras. 16–27). See generally Cortés Martin, "Sur l'adhésion à la CEDH et la sauvegarde de l'autonomie de l'ordre juridique de l'Union dans l'identification du défendeur pertinent: Le mécanisme du codéfendeur", (2011) *Revue du droit de l'Union européenne*, 615.

35. For a critical approach towards the prior involvement of the ECJ through the means of preliminary reference requisite, De Schutter, op. cit. *supra* note 27, para 2; Lock, op. cit. *supra* note 7, 791–792.

addressed.[36] Should that alleged consequence be true, that would hardly be consistent with the obligation to accede, as outlined above.

In strict relation to these observations, the prior involvement attracted further criticisms. On the one hand, it was claimed that it accords a privilege to the EU in comparison to the States parties of the ECHR.[37] For, in essence, their national supreme courts are routinely not required to rule before the ECtHR does so in a concrete application pending before it. On the other hand, it was submitted that the ECJ ruling could jeopardize the autonomy of the Strasbourg Court for it would hardly contradict a previous ruling of the ECJ.[38] All these unfavourable comments explain the theoretical and practical interests underpinning the "prior involvement" mechanism.

4. The prior involvement mechanism under the Draft agreement

Article 3(6) of the Draft agreement establishes the prior involvement of the ECJ provided that two conditions are fulfilled: *i*) the EU is co-respondent in the proceedings pending before the Strasbourg Court; and *ii*) the ECJ has not yet assessed the compatibility with the Convention rights at issue of a "provision of European Union law" (Art. 3(6) first sentence).[39] These conditions are conceived as *cumulative*: both must be fulfilled for the possibility of a prior ruling to be given to the ECJ.

The first normative element provides that the EU Member State is the respondent party before the ECtHR, while the EU is the co-respondent because the case calls into question the compatibility with the rights at issue defined in the Convention (or in the protocols to which the EU will accede) of a provision of EU law. The underlying assumption is that the latter requires implementing measures at national level so that the application would be lodged against these acts (or omissions) of the specific respondent State.[40] The logic of the mechanism seems to be that it can be triggered only in situations whereby implementation of EU law is strictly required from Member States. Indeed, in this scenario, the judicial protection of individual rights, under the

36. De Schutter, op. cit. *supra* note 27, para 2; Gaja, op. cit. *supra* note 27, p. 194; id., "The 'co-respondent mechanism' according to the draft agreement for the accession of the EU to the ECHR", 2 *Esil Reflections* (2013), 4; Lock, op. cit. *supra* note 27, 185.

37. Potteau, op. cit. *supra* note 4, 105; Gaja, op. cit. *supra* note 27, p. 194; id., op. cit. previous note, 4; Lock, op. cit. *supra* note 27, 182.

38. De Schutter, op. cit. *supra* note 27.

39. *Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Final report to the CDDH, Strasbourg, 3–5 Apr. 2013, 47+1(2012)008, 7.

40. For it contains a reference to Art. 3(2) of the Draft agreement.

EU legal order, is usually achieved *through the national courts*. It might be worth stressing that, coherently with its rationale, the prior involvement mechanism does not apply in case of EU direct remedies.

In national cases, in accordance with the ECtHR's subsidiary function, the individual concerned is expected previously to exhaust the domestic remedies of the respondent State. It follows, in this context, that the only way to have access to the Luxembourg judges, in order to challenge the validity of the EU law provision or the measure which is at the origin of the alleged violation of the Convention, rests on the decision of the national court to seek a preliminary ruling from the ECJ pursuant to Article 267 TFEU. As is known, whenever the question concerning the coherence of an EU legal provision with a fundamental right arises, the national court can or has to refer a preliminary ruling to the ECJ on the validity of the EU act or on the interpretation of a provision of primary law which may require a consistent construction with fundamental rights (since the ECJ may not rule on the validity of primary law). That explains why the prior involvement rule provides that if the ECJ had no such possibility, because the national court did not make a request for a preliminary ruling – or even because a question of EU law compatibility with fundamental rights may not have arisen allowing for a preliminary reference – "sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment" (Art. 3(6) first sentence). Arguably, the Strasbourg Court will have to stay the proceedings, whilst the EU is obliged "to ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed" (Art. 3(6), third sentence). Presumably, the ECJ will rule through an accelerated procedure in order to safeguard the interest of the individual concerned to have swift proceedings. The procedures by which the ECJ is involved are to be dealt with at EU level, likely through *internal rules* to be adopted by the institutions when concluding the accession agreement.

The external control of the Strasbourg Court and its prerogatives under the ECHR are preserved, for the prior involvement rule "shall not affect the powers of the Court" (Art. 3(6), last sentence). Hence, the autonomy of the Strasbourg Court is not undermined. As the Draft Explanatory report clearly states, the accession implies that the decisions of the ECtHR "in cases to which the EU is party will be binding on the EU's institutions, including the CJEU".[41] The provision reflects the binding force of the Strasbourg Court's

41. *Fourth Negotiation Meeting Between the CDDH Ad Hoc Negotiations Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Draft explanatory report to the agreement on the accession of the European Union to the convention for the protection of human rights and fundamental freedoms, Strasbourg, 8 Jan. 2013, 47+1(2013)002, 21d.

decisions *vis-à-vis* the Contracting Parties according to Article 46 ECHR. Even if the ECJ holds that the EU provision is invalid, the applicant will not lose the status of victim for the purpose of the ECHR, unless the national court's decision is quashed and the applicant's rights are restored in terms of *restitutio in integrum* or just compensation.

The second condition needs to be fulfilled by virtue of EU internal rules and, if necessary, by way of interpretation. The *lack of assessment* requirement seems to imply that the ECJ has never dealt with the violation of the fundamental right raised by the applicant before the Strasbourg Court, so that in its case law under both direct and indirect remedies, the ECJ has never rejected a plea of illegality concerning an EU act with regard to the fundamental right at issue, nor interpreted a provision of primary law in a coherent way with a specific fundamental right. In other words, there would have to be a sort of a *petitum identity* between the ECJ ruling and the right which is at stake before the Strasbourg Court. Conversely, this condition is not fulfilled if the ECJ actually stated, even through *obiter dicta*, that the EU law provision does not conflict with the same fundamental right issue raised before the ECtHR. On this and other potential controversial issues it seems reasonable to expect that the ECtHR will decide upon a request to suspend proceedings made by the Union.

In addition, one may wonder about the possibility to suspend the Strasbourg proceedings if the ECJ has ruled on an issue in the specific circumstances of a given case, and when new elements and/or another context highlight the case in a different manner. It appears in line with the rationale of the prior involvement rule, as tentatively demonstrated *infra*, that the Luxembourg Court would be given the possibility to address the matter again. After all, an evolution of the Strasbourg Court's jurisprudence could bring the ECJ to link its ruling with the former. For instance, in *PVC II* the ECJ made such an alignment as regards the right to protection against self-incrimination,[42] as it did in *Roquette Frères SA*.[43] The recent *N.S.* ruling[44] confirms this attitude of the ECJ as regards in particular the well-known Strasbourg Court ruling in the *M.S.S.* case,[45] though the *N.S.* judgment focuses in particular on the values of the Charter of fundamental rights.

As to the viability of the prior involvement mechanism, it is however worth noting that, just before the Council decision on the negotiating directives, it was advocated by the two courts themselves. The ECJ published a "Discussion

42. Joined Cases C-238/00 P, C-244, 245, 247, 250-252/99 P, *Limburgse Vinyl Maatschappij (LVM) and other* v. *Commission*, [2002], ECR-I 8375, paras. 273–276.

43. Case C-94/00, *Roquette Frères SA*, [2002] ECR I-9039, para 29.

44. Joined Cases C411 & 493/10, *N.S.*, judgment of 21 Dec. 2011, nyr, paras. 88–108.

45. Cited *supra* note 18.

document" pleading for a mechanism "capable of ensuring that a question of validity of a Union act" as to compliance with fundamental rights "can be brought effectively before the Court of Justice before the ECtHR rules on the compatibility of that act with the Convention".[46] A joint communication of the Presidents of the two Courts endorsed this at a later date.[47] It has been argued that the ECJ imposed the prior involvement mechanism in order to preserve its monopoly on the interpretation of EU law, as well as on the validity of EU acts.[48] Be that as it may, the mechanism remains contentious not only because it is not clear whether it is consistent with the ECHR system (*infra*, section 5), but also because its EU legal basis needs to be grounded in relation to Protocol No 8 (*infra*, section 6). These issues will be now addressed.

5. The prior involvement rule's coherence with the ECHR

The judicial system of control instituted by the ECHR is based on the *principle of subsidiary function* as regards the Contracting Parties. This essential character has also been stressed by the Interlaken Declaration,[49] as well as by the General Secretary of the Council of Europe,[50] having in mind in particular the relevant and increasing backlog of the Strasbourg Court.

Enshrined in Articles 1, 13 and 35(1) ECHR, the subsidiary nature of the supervisory mechanism implies that it is primarily up to the authorities of the Contracting party to apply the Convention rights, guaranteeing and protecting them at national level. Thus, a concrete case of alleged violation of the ECHR can be brought before the ECtHR only after all local and effective remedies

46. Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European convention for the protection of human rights and fundamental freedoms, <curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/ convention_en_2010-05-21_12-10-16_272.pdf>, para 12. Basically, the ECJ argued that the prior involvement was to be justified on two grounds: first, on the principle of subsidiarity provided for in the control mechanism of the ECHR (para 6); second, because in the judicial system of the EU, the ECJ alone has the jurisdiction to declare that an act of the Union is invalid (para 8).

47. Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, further to the meeting between the two courts in Jan. 2011, <curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf>.

48. Benoit-Rohmer, cited *supra* note 1, 290–291.

49. *High Level Conference on the Future of the European Court of Human Rights*, Interlaken Declaration, 19 Feb. 2010.

50. *Contribution du Secrétaire Général du Conseil de l'Europe à la préparation de la conférence ministérielle d'Interlaken*, 14 Jan. 2010.

have been exhausted in accordance with the relevant domestic law.[51] The ECtHR has consistently reiterated that its supervisory role by virtue of Article 1 ECHR is subject to that principle, since "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities".[52] Further, according to a well-established jurisprudence, Article 35(1) essentially refers back to the procedures prescribed by the domestic law of the Contracting party concerned.[53] Against this background, it can be argued that the prior involvement mechanism does fit the subsidiary character of the ECHR's judicial control.

It seems all the more so if one considers another essential element of that character – the "margin of appreciation" doctrine as elaborated in the case law of the Strasbourg Court. Subject to some limits, Contracting Parties enjoy a measure of discretion in the implementation of the Convention provisions, allowing due regard to be given to local specificities.[54] National judges have a primary responsibility in this respect.[55] The same principle should be applied to the EU: a ruling of the Luxembourg Court prior to the decision in Strasbourg would have the advantage that the former's perspective would be taken into account, as long as the Strasbourg Court's powers are respected.

The prior involvement mechanism seems to offer another advantage. In the EU legal order fundamental rights may be conceived as a complex set of primary common values of the European society – "the peoples of Europe",[56] or the peoples of the Member States. Those values can be considered the pillar of the *European identity*. The upgrading of the Charter of Fundamental Rights to the rank of primary law is not only relevant in terms of hierarchy within EU law sources. It may also be viewed as a means to constitute, in a foreseeable

51. E.g. *Kemmache* v. *France*, Appl. No. 17621/91, judgment of 24 Nov. 1994, paras. 37–38; Conforti, "Principio di sussidiarietà e Convenzione europea dei diritti umani", (1994) *Rivista di diritto internazionale*, 42.

52. *Ex multis Kudla* v. *Poland*, judgment of 26 Oct. 2000, para 153; *Z. and others* v. *the UK*, judgment of 10 May 2001, para 103.

53. *Kemmache* v. *France*, cited *supra* note 51, 37.

54. Cf. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the ECHR* (Intersentia, 2002), *passim*; Lugato, "Sulla sussidiarietà in diritto internazionale", (2011) *Archivio Giuridico*, 3 et seq.; id., "The margin of appreciation and freedom of religion: Between treaty interpretation and subsidiarity", electronic copy available at: <ssrn.com/abstract=2182377>.

55. As mentioned above, the High level conference on the future of the European Court of Human Rights, held at Interlaken on 19 Feb. 2010, stressed the "subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, that is, governments, courts and parliament must play in guaranteeing and protecting human rights at the national level". Moreover, it reiterated the call "for a strengthening of the principle of subsidiarity".

56. Art. 1(2) TEU.

perspective, a *social compact* among European citizens.[57] The EU legal order may be viewed as a unique experience in the landscape of international cooperation, namely if and when it will integrate the peoples of Europe in a supranational framework. So far, focus is put on roots common to the Member States, and on shared values underlying them. It is an emphasis which confirms the tendency towards an integration process which is not *only mercantilist* but also is permeated with social, cultural and humanistic values and with the rule of law. The system refers to a social group composed *in primis* by the citizens of the Union, holding a set of rights stemming directly from the citizenship of the EU which creates an opportunity for a "European civic identity, and there-with an European civic *demos*".[58] In this logic, such a *status civitatis* points not only to the link with the *Nationszugehörigkeit*, but also to a new concept of membership, gradually shaping itself in supranational terms,[59] with a view to social cohesion,[60] capable of assimilating a composed and complex social body – the "peoples of Europe".

57. In that regard, it seems relevant that the Charter's scope is wider than that of the ECHR, even considering its additional Protocols. For instance, the Charter contains some innovative provisions, such as a prohibition on reproductive human cloning and a protection of labour rights.

58. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (OUP, 2008), p. 145.

59. It might be worth recalling that even the ECtHR did recognize the specific character of EU citizenship in *Piermont* v. *France*, Appl. No. 15773/89, judgment of 27 Apr. 1995, para 64. See generally Schönberger, "European citizenship as federal citizenship. Some citizenship lessons of comparative federalism", 19 *Revue Européenne de Droit Public* (2007), 61. In that regard it seems worth recalling the Opinion of A.G. Poiares Maduro in the *Rottmann* case (C-135/08, *Rottmann* v. *Freistaat Bayern*, [2010] ECR I-1449): EU citizenship "presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people. On the contrary, that political relationship unites the peoples of Europe. It is based on their mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale. It does not require the existence of a people, but is founded on the existence of a European political area from which rights and duties emerge. In so far as it does not imply the existence of a European people, citizenship is conceptually the product of a decoupling from nationality". Again, EU citizenship "strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States). Access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, like any form of citizenship, it forms the basis of a new political area from which rights and duties emerge, which are laid down by Community law and do not depend on the State. This, in turn, legitimizes the autonomy and authority of the Community legal order" (para 23).

60. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (O.J. 2004, 229/35) states that the enjoyment of the EU citizen's rights (in particular, the right to settle long term in the host Member State) "would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union".

Arguably, the Charter of Fundamental Rights is one of the most unifying *factors* of this European identity in the making. It would not only exercise a protective function of individual rights, but it would also express the set of common values around which to build this social identity. It is true, however, that an essential legacy of the original EU integration process, and which is still one of its pillars, is the establishment of the internal market, including its economic freedoms.[61] Conflicts with this original set of EU original values may arise, as the controversial cases of *Laval* and *Viking* show,[62] despite the impressive changes introduced by ECJ jurisprudence and by the Lisbon Treaty.[63] Thus, there is good reason to seek their reconciliation by the ECJ first, giving the ECtHR the possibility to take into account the *specific nature and traits* of the EU integration process.[64]

In that respect, it seems reasonable to argue that the ECJ is best positioned to assess, against the background of the complexities and uniqueness of the EU legal order, the compliance of EU acts with the catalogue of fundamental rights as enshrined both in the Convention and in the broader framework of the Charter. If the ECJ states that a EU secondary law provision cannot be regarded *per se* as running counter to fundamental values because it leaves a

61. In some instances, the ECJ compares the restriction imposed on the economic freedom provided for in the Treaties by the measures taken in order to protect a given human right and ultimately uphold the restriction if it is limited, necessary and proportionate (Case C-112/00, *Schmidberger* v. *Austria*, [2003] ECR I-5659, concerning the clash between the free movement of goods and the freedom of expression and assembly; Case C-36/02, *Omega Spielhallen*, [2004] ECR I-9609, as to the restriction of marketing in Germany of laser games which simulated killings of human beings; Case C-244/06, *Dynamic Medien*, [2008] ECR I-505, regarding the circulation of goods and the protection of children). Moreover, in *Vlassopoulou* the ECJ made it clear that economic freedoms amount to fundamental rights conferred by the Treaty to the citizens (Case C-340/89, *Vlassopoulou*, [1991] ECR-I 2357, para 22).

62. Case C-341/05, *Laval un Partneri Svenska Byggnadsarbetareförbundet*, (2007) ECR I-11767, paras. 101–111; Case C-438/05, *International Transport Workers' Federation* v. *Viking*, [2007] ECR I-10779, paras. 74–90. In these cases the ECJ ruled in the end that the constraints imposed on the free movement of services or freedom of establishment in order to safeguard the right to strike as a fundamental right, were unjustified and disproportionate. The ECJ approach was contrasted with two judgments of the ECtHR which in *Demir & Baykara* v. *Turkey*, judgment of 12 Nov. 2008, Appl. No. 34503/97, and *Enerji Yapi-Yol* v. Turkey, judgment of 24 Apr. 2009, Appl. No. 68959/01, interpreted Art. 11 ECHR widely with the aim to protect the fundamental rights to collective bargaining and to collective action.

63. It is noticeable that the ECJ, inspired by the constitutional values common to the Member States, has been building the EU legal order all the more on the protection of fundamental rights. Amongst others rulings, *Kadi* (cited *supra* note 13) shows the importance of fundamental rights as structural principles of the EU. It is not by chance that, building upon the ECJ case law, the Union is now explicitly founded on the inviolable and inalienable rights of the human persons, freedom, democracy, equality and the rule of law (Art. 2 TEU).

64. For a different conclusion see Scheeck, op. cit. *supra* note 24, 853.

margin of manoeuvre to the Member States when they implement that provision, under the EU legal order the latter are obliged to use this discretionary power in a manner in compliance with fundamental rights. One could reasonably expect that the ECtHR will accept this ECJ assessment, so that in a specific case of violation of the ECHR responsibility would be in principle allocated to the Member State directly concerned. Clearly, this is not to say that the ECJ priority ruling could or should affect the ultimate powers and jurisdiction of the Strasbourg Court. It is a matter of course that its decision in cases to which the EU is party will be binding on the EU institutions, along with the ECJ, whose previous assessment of the case will naturally not bind the ECtHR.[65]

In a broader perspective, one may still query whether the prior involvement rule is *per se* a watertight solution to the issue concerning the adjustment of the EU judicial system to the Convention's principle of subsidiarity. In that respect, it is worth focusing on the evolution of the ECtHR case law as regards the subsidiarity element enshrined in Article 13 ECHR. The Court held that this provision binds the Parties to ensure a judicial relief at the national level that must be *effective*. In *Lukenda* the Strasbourg Court carefully defined the obligation stemming from Article 13 – the Parties not only have the general obligation to solve the problem that led the Court to find a violation of a fundamental right, but also, in procedural terms, they "must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights".[66] In the Strasbourg Court's logic, the internal procedure should provide for an *adequate* redress at domestic level – the remedy must not be unjustifiably hindered by acts or omissions of the authorities of the Party concerned.[67]

65. *Fourth Negotiation Meeting Between the CDDH Ad Hoc Negotiations Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Draft explanatory report, cited *supra* note 41, 60.

66. *Lukenda* v. *Slovenia*, Appl. No. 23032/02, judgment of 6 Oct. 2005, paras. 94 and 95.

67. That seems quite a natural consequence once the accession is finalized: in *Altun* v. *Turkey*, Appl. No. 24561/94, judgment of 1 June 2004, the Strasbourg Court held that "Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State", para 70.

In that regard, the prior involvement rule rectifies *ex post* an inaccurate decision taken by a national judge, who failed to give the parties due access to the ECJ. As further explained below, preliminary rulings proceedings complete and integrate the judicial protection provided for by the EU legal order. Yet the EU judicial system shows some unsatisfactory elements whenever individuals have access to a *direct remedy* before the Luxembourg judges[68] – a situation to which, as noted above, the prior involvement mechanism is not applicable.

Undoubtedly, the ECJ has on several occasions held that the treaties provide for a complete system of remedies. Nevertheless, this assumption needs to be balanced with the stringent evolution of the ECtHR case law on Article 13 ECHR. Given the ECJ's well-known restrictive interpretation of the "individual concern" requirement with regard to Article 263 TFEU, in the perspective of the accession of the EU to the ECHR a gap in the judicial protection might follow, subject to the interpretation of the new provision enshrined in Article 263(4) TFEU. If a strict interpretation of that provisions prevails, then it would be desirable to revisit the *Plaumann* jurisprudence to better accommodate the EU judicial system to the obligation stemming from *Lukenda* and related case law.[69] The problem is that the step forward ensured by the new Article 263(4), last sentence TFEU, still excludes some acts from being subject to judicial control, namely the legislative provisions that do not entail implementing measures.[70] In *Inuit* and *Microban* the General Court denied that the notion of "regulatory act" includes legislative acts.[71] To the extent that, even after the Treaty of Lisbon, there are still acts capable of affecting individual fundamental rights over which jurisdictional control is not ensured, it is arguable that the interpretation of the "individual concern" requirement pursuant to Article 263 could be extensively reshaped. However, if it is possible to challenge the lawfulness of a legislative act (not requiring implementing measures) because of its alleged incompatibility with fundamental rights, through the means of a preliminary reference to the ECJ,

68. As is known, an EU act may be challenged in several ways – either through a direct action under Art. 263 TFEU, or under Art. 277 TFEU, or through the preliminary ruling procedure under Art. 267 TFEU.

69. Case 25/62, *Plaumann*, [1963] ECR 195; Joined Cases 106 & 107/63, *Toepfer*, [1965] ECR 497; Case 62/70, *Bock*, [1971] ECR 897; Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, [2002] ECR I-6677.

70. Amplius Balthasar, "Locus standi rules for challenges to regulatory acts by private applicants: The new Article 263(4) TFEU", 35 EL Rev. (2010), 342.

71. Case T-186/10, *Inuit*, Order of 6 Sept. 2011. In Case T-262/10, *Microban*, 25 Oct. 2011, the General Court held that "the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts" (para 21).

then the EU system of judicial review could amount in principle to being safe, having in mind its *specificity*.[72]

6. The prior involvement rule and the EU legal system

In the EU legal order, the accession agreement is a mere international treaty that will be concluded by the EU only,[73] irrespective of the additional intervention of national consent – which is, rather oddly, required (not to mention the ratification of all non EU States that are members of the Council of Europe).[74] Besides, Member States, pursuant to the principle of sincere cooperation, should facilitate the achievement of the Union's objective to achieve the accession to the ECHR.

In the EU hierarchy of norms, international agreements are binding upon the institutions and Member States.[75] Primacy over secondary and third level law acts does not, however, extend to primary law.[76] As a result, the accession agreement must comply with the conditions provided for in Protocol No 8, as well as with the constraint which prevents accession from affecting the

72. It is worth recalling that the ECJ held that "the opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon acts actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly" (Case C-491/01, *British American Tobacco*, [2002] ECR-11453, para 40).

73. Pursuant to Art. 218(6)(a)(ii), the Council adopts the decision concluding the agreement after obtaining the consent of the European Parliament.

74. Art. 218(8) TFEU makes it clear that the Council decision cannot enter into force unless "it has been approved by the Member States in accordance with their respective constitutional requirements". This requirement, added pending the negotiation of the Lisbon Treaty, implies in essence a double approval by the national parliaments. The Member States are already parties of the ECHR and in order to allow the EU accession they are expected to ratify the agreement since it entails modifications of the ECHR. It is not easy to understand its rationale: the accession agreement can hardly be conceived as a mixed treaty from the EU standpoint. The approval of the Council decision according to their respective constitutional requirements, though formally related to the Council decision, overburdens the EU internal procedure. Certainly, the Council decision may cover some new internal provisions aimed at complementing the legal framework of the accession. Nonetheless, the recourse to the "constitutional requirements" seems somehow excessive, given that the Council decision needs unanimity and that the perspective of EU accession has been already approved by national parliaments when they ratified the Treaty of Lisbon: Baratta, "Le principali novità del Trattato di Lisbona", (2008) *Il Diritto dell'Unione europea*, 42; Gaja, op. cit. *supra* note 27, 183.

75. Art. 216(2) TFEU. Specialists often remark that primary law is a superior source of law with respect to the international agreements concluded by the institutions: *inter alia* Isaac and Blanquet, *Droit général de l'Union européenne*, 9th ed. (Dalloz, 2006), p. 197.

76. Case C-308/06, *Intertanko and Others*, [2008] ECR I-4057, para 42 and case law cited.

Union's competences as defined in the Treaties.[77] A Draft agreement inconsistent with these conditions would surely be rejected by the ECJ in its opinion pursuant to Article 218(11)TFEU.[78] Therefore, from the EU perspective the matter is not *if* the EU accedes to the ECHR – since the Union "shall accede" – but *how* (the *quomodo*), when acceding, to preserve all the conditions laid down by the treaties and notably in Protocol No. 8.[79] Having that in mind, the problem lies in whether EU primary law requires the prior involvement mechanism or not. This article argues that a positive response is necessary, whilst the diametrically opposite view is not only at odds with EU primary law requirements, but it could also result in affecting the applicants' individual rights.

6.1. *The fundamental role of the ECJ in protecting individual rights through the preliminary ruling: the "ex-ante supervisory judicial model"*

In the EU, the judicial protection of individuals is and remains anchored to mainly national judicatures. It is a model in which EU rights conferred on natural and legal persons, including human rights, are enforced by domestic courts routinely acting as first instance judges, generally with quite a limited discretion to refer questions to the ECJ.[80] The essential role of domestic courts is focused in Article 19(1) TEU. They are the *ordinary guardians* of the EU legal system, along with the ECJ[81] which ensures an *ex ante* influence on and supervision of the national judge ruling. No doubt the so-called direct remedies – i.e. direct access to Luxembourg courts to challenge the validity of EU law provisions – are quite limited, given the origin, the nature and the functions of the ECJ. Overall, this system can be described as an *ex ante supervisory judicial model* in which the *primacy of ECJ ruling* is essential. In this model, the preliminary ruling procedure amounts to being not only a founding principle of the EU legal order, but also a cooperative instrument for protecting individual rights. National courts, pursuant to the principle of

77. Art. 6(2) TFEU (last sentence).

78. Requested in July 2013, see *supra* note 1. The text of the request is not available at the time of writing.

79. This passage does not contradict the statement in the introduction to the effect that Art. 6(2) TEU is a qualified commitment of means. It just highlights the challenge of the EU negotiation with the Council of Europe in order to meet the several conditions posed by primary law (the *quomodo*) for accession to occur.

80. Although the treaties provide for the option of extending the power to adjudicate of the EU courts to disputes relating to EU acts – such as Art. 262 TFEU as regards intellectual property rights – that is a mere option which does not establish a monopoly for the Luxembourg judges: Opinion 1/09, paras. 62 and 80, nyr.

81. Opinion 1/09, para 66.

sincere cooperation, are obliged to ensure, in their territories, the application and respect for EU law.[82] As a consequence, the prior involvement mechanism seems to mirror at best "the specific characteristics of the Union and Union law" which have to be preserved by the accession agreement pursuant to Article 1(a) Protocol No. 8. Under Article 19 TEU and the related constitutional jurisprudence, the constructive dialogue of the national judges with the ECJ is an essential and unique feature of the EU legal order which cannot be compared to a State model of justice. In line with the principle of subsidiarity on which the EU judicial system is founded, both the ECJ and the national judge – *le juge communautaire de droit commun*[83] – ensure *la justiciabilité* of individual rights, including above all those having fundamental nature.[84]

This characteristic of the EU legal order has featured particularly in a *constitutional* ECJ jurisprudence. Opinion 1/09 – a case concerning the conferral of the power to adjudicate on individual disputes to an international court – is quite revealing.[85] National judges are considered as being instrumental in achieving the integration objective through normative means. They also seem to have received a necessary delegation of power for protecting individual rights, becoming irreplaceable enforcers of EU law under the ex ante supervision role of the ECJ through the preliminary ruling procedure. Hence, Article 267 TFEU amounts to being a tool *to ensure the protection of individual rights as guaranteed by EU law* (including the Charter of Fundamental Rights) which the ECJ, indirectly but primarily, and national

82. Ibid., paras. 68–69.

83. This is the wording used by the French Conseil d'Etat (Dubout, "Du fond à la forme de l'arrêt Perreux: Retour sur l'affirmation de sa fonction communautaire par le Conseil d'Etat français", 110 *Les Petites Affiches* (2010), 7). See also Case T-51/89, *Tetra pak* v. *Commission*, [1990] ECR II-347, para 42: the General Court stated that when applying EU antitrust law "the national courts are acting as Community courts of general jurisdiction".

84. Indeed, the national judge is the ordinary judicature: Timmermans, "L'adhésion de l'Union européenne à la Convention européenne des Droits de l'homme", <www.europarl.europa.eu/document/activities/cont/201003/http://20100324ATT71235/20100324ATT71235EN.pdf>.

85. Yet, the ECJ long-standing case law already enhanced the preliminary reference procedure when it stressed its function of pursuing the full and uniform application of EU law through national courts (see e.g. Case C-355/04 P, *Segi*, [2007] ECR I-1662, paras. 53–54. The preliminary ruling procedure has been an exceptional means for ensuring effectiveness and supremacy of EU law, as well as an instrument for integrating very different legal traditions: *ex multis* Barav, "Transmutations préjudicielles" in Colneric et al. (Eds.), *Une Communauté de droit. Festschrift für G.C. Rodriguez Iglesias* (2003), p. 621; Tridimas, "Knocking on heaven's door: Fragmentation, efficiency and defiance in the preliminary reference procedure", 40 CML Rev. (2003), 9; Jacobs, "Effective judicial protection of individuals in the European Union: Now and in the future", (2002) Dir. Un. Eur., 203. As regards the reasons behind the success of preliminary ruling procedure, see Carrubba and Murrah, "Legal integration and use of the preliminary ruling process in the European Union", 59 IO (2005), 399–418.

judges, directly, have to secure within domestic legal orders.[86] It is a matter of course that this is not a relation among equals, arguing from Article 19 TEU and the long-standing jurisprudence on the effect of Article 267 rulings on the national courts. Precisely because of the primary role attributed to the ECJ, one may assume that the preliminary ruling judgments and the related domestic court decisions are a *unitary and constituent* part of the legal system protecting individual rights, amounting to an *essential part of the basic features* of the EU legal order as a whole. To deny access to the ECJ through the preliminary rulings procedure is a failure of the EU judicial system.

It is exactly against this background that Article 2 of Protocol No. 8 (the accession agreement "shall not affect" the powers of its institutions) deserves to be considered. Even though the term "affect" is neutral, it implies the obligation not to harm the powers attributed to the judicial institutions and, particularly, those pertaining to the ECJ under the preliminary ruling procedure. International agreements concluded by the Union cannot alter the allocation of responsibility conferred on the ECJ by the Treaties, since its judicial power, as intertwined with those of national judges, is a founding principle of the EU legal order which requires respect *inter alia* when the EU seeks accession to the ECHR.[87]

The prior involvement rule does not aim at safeguarding the ECJ's monopoly to rule on the invalidity of the EU acts. This perspective would hardly be conclusive. For it is clearly not in the remit of the ECtHR to declare an act of the Contracting Parties void. On the contrary, the Strasbourg Court decides only on the compatibility of a given Party's conduct with the obligations stemming from the ECHR. The monopoly argument is perhaps relevant as to the interpretation of EU law. Certainly, as an international jurisdiction, the Strasbourg Court usually considers the domestic law of the Contracting parties as a matter of fact, without dwelling in depth on its interpretation. According to settled case law it is primarily for national authorities, notably the courts, to interpret and apply domestic law, the Strasbourg Court's role being confined to ascertaining that the effects of such an interpretation are compatible with the Convention.[88] But even though the ECtHR might embark on a minimal interpretation of EU law, that result would not be susceptible of imposing any constraint on the ECJ's ultimate role to

86. Opinion 1/09, paras. 83–85.

87. Opinion 1/91, [1991] ECR-I 6079, paras. 35, 71; C-459/03, *Commission* v. *Ireland*, [2006] ECR-I 4635, para 123.

88. *Kruslin* v. *France*, Appl. No. 11801/85, judgment of 24 Apr. 1990, para 29 ; *Slivenko* v. *Latvia*, Appl. No. 48321/99, judgment of 9 Oct. 2003, para 105; *W.* v. *Netherlands*, Appl. No. 20689/08, judgment of 20 Jan. 2009 (admissibility); *Guérin Automobiles* v. *15 Etats de l'Union européenne*, cited *supra* note 17: "La Cour rappelle d'emblée qu'elle n'a pas pour tâche de se substituer aux juridictions internes des Etats parties à la Convention. C'est au premier chef aux

ensure uniformity in the interpretation and application of the common law throughout the territories of the Member States.[89] After all, one can safely say that it is not in the Strasbourg Court's remit to tell the ECJ what the content of the EU substantive law would generally be.[90] In this respect, the prior involvement mechanism allows the Strasbourg Court to apply the EU law provision on the basis of the previous interpretation of the ECJ, whose power as the ultimate interpreter of EU law would hence be respected.

In the EU related cases the exhaustion of local remedies principle does not entail that the individual application should be dismissed by the ECtHR if the national judge fails to make a request for a preliminary ruling. Such an outcome would be hardly acceptable, since this procedure is not at the disposal of individuals. It is here suggested that this failure creates a gap which should be filled precisely through a means which recovers the judicial role of the ECJ. It does not seem to be a privilege accorded to the EU with respect to other Contracting Parties. Their respective situations are not comparable. On the contrary, rejecting the prior involvement mechanism would imply that the ECtHR would be called to rule in an EU related case without the EU judge being able to assess the relevant issue. The specificity of the EU judicial system, and in particular the hierarchical relationship between the national judges and the ECJ,[91] would be undermined.

6.2. *The unsatisfactory results of denying the prior involvement of the ECJ*

A diametrically opposite view holds that the preliminary involvement mechanism is unfounded.[92] As a result, the application against a (respondent) Member State brought before the Strasbourg Court for an implementing measure concerning an EU law provision or act, would be admissible as soon as the applicant exhausted the domestic remedies. It would be so regardless of whether the plaintiff requested the national judges to refer for a preliminary question to the ECJ or not.

autorités nationales, et notamment aux cours et tribunaux, qu'il incombe d'interpréter la législation interne"; *Markovich and others* v. *Italy*, Appl. No. 1398/03, judgment of 14 Dec. 2006, para 108.

89. De Schutter, op. cit. *supra* note 27, section 1.2.

90. That is so regardless of the fact that a ruling may imply reforms of domestic legislation which can sometimes be an implied consequence: e.g. *Marckx* v. *Belgium*, Appl. No. 6833/74, judgment of 13 June 1979, paras. 36, 37, ; *Dudgeon* v. *United Kingdom*, Appl. No. 7525/76, judgment of 24 Feb. 1983, para 14; *Norris* v. *Ireland*, Appl. No. 10581/83, judgment of 26 Oct. 1988, para 33.

91. Baratta, "National courts as 'guardians' and 'ordinary courts' of EU law: Opinion 1/09 of the ECJ", 38 LIEI (2011), 319–320.

92. De Schutter, op. cit. *supra* note 27, para 2.

The first argument against this scenario is that the preliminary ruling procedure is claimed to be *tamquam non esset*, i.e. irrelevant, as it is ancillary in the EU judicial system. As tentatively shown above, such an outcome is hardly consistent with the nature of the preliminary ruling procedure which is at the centre of the judicial architecture of the EU legal order, allowing the national judge to apply EU law provisions under the direct collaboration, or more correctly control, of the ECJ. Tellingly, a form of responsibility has also been shaped whenever the national judge fails to refer a case to the ECJ, pursuant to the *Köbler* ruling.[93] It means that the right to access the ECJ may be pleaded by the individuals directly concerned against the Member State whose court failed to raise a preliminary request. Even from this standpoint, the ECJ performs an essential element of control with regard to the domestic judicial functions.[94]

Secondly, to deny the prior involvement of the ECJ could also imply that the exhaustion of remedies condition enshrined in Article 35 ECHR is considered to be met provided that the applicant had a proactive role in raising the question regarding the compatibility of a given EU act with fundamental rights and requested the national court to refer a preliminary question to the ECJ on the matter forthwith.[95] In this perspective, although the EU treaties do not envisage this procedure as providing an *individual* remedy, the party's initiative to refer the case to the ECJ regarding the alleged human rights violation would suffice per se. A failure of the national court to ask for a preliminary ruling would be capricious and amount to a violation of the right of access to court under Article 6 ECHR.[96] Further, that failure could also imply an infringement of the EU legal order, given the obligation to refer to the ECJ validity issues concerning secondary law, as held in *Firma Foto-Frost*.[97]

93. Case C-224/01, *Köbler*, [2003] ECR I-10290, paras. 35–36.

94. Morelli, "La Corte di giustizia delle Comunità europee come giudice interno", (1958) Riv. dir. int., 3.

95. De Schutter, op. cit. *supra* note 27, para 2; Jacqué, op. cit. *supra* note 1, para 4.

96. De Schutter, ibid.; Potteau, op. cit. *supra* note 4, 103. Cf. by analogy the Strasbourg Court case law examined in Van Dijk et al., *Theory and Practice of the European Conventionon Human Rights*, 4th ed. (Intersentia, 2006), p. 563. See also the Commission of Human Rights decisions according to which a refusal by a national court to seek advice from the ECJ could lead to a violation of the ECHR and could be contrary to the right to access a court in each stage of the procedure, especially when the national court's refusal is arbitrary (Scheeck, op. cit. *supra* note 24, 868).

97. Case 314/85, *Firma Foto-Frost*, [1987] ECR 4199, where the ECJ held that the national courts have no power to declare a Union act invalid, on the basis of policy considerations, that is to say by stating the necessity of safeguarding the uniform application of Union law. For an implicit case of a failure to refer see C-154/08, *Commission* v. *Spain*, [2009] ECR I-187.

Even this approach is not convincing for it fails to achieve an effective protection of individuals' rights. On the one hand, although the individual may ask the national court to initiate a preliminary ruling procedure before the ECJ, in order to demonstrate that he had exhausted domestic remedies in accordance with Article 35(1)ECHR, in legal terms that procedure is not at his disposal. Not only can the national court reject that request, but also the preliminary ruling procedure is by its very nature not a remedy, but rather an instrument of ex ante dialogue/control between national and Luxembourg judges.

On the other hand, in terms of judicial protection of the individual, the intervention of the Strasbourg Court risks being quite limited, should it cover, as has been suggested, only the denied access to the ECJ for a preliminary ruling. The external control would not be able to assess any violation of a fundamental right whose breach has been alleged. The role of the ECtHR would be just to evaluate whether the denial of the right of access to a court is contrary to Article 6 ECHR (due process right). This is the only possible solution if one considers that the exhaustion of the local remedies condition, pursuant to Article 35(1)ECHR, would not have been met since the ECJ was not given the opportunity to rule. In other words, there would be no judicial remedy in order to evaluate the alleged violation of the fundamental substantive right at stake and no form of reparation whatsoever in that regard.

One could also argue that the respondent State before the ECtHR could also face an infringement procedure lodged by the Commission with the ECJ for the very same facts. In this case, the ECJ ruling would merely prevent the violation of the obligation to seek a preliminary ruling from the ECJ stemming from Article 267 TFEU. Ultimately, the complainant's judicial protection would be undermined. Furthermore, a punitive attitude towards governments would prevail, since the State whose judges refused to make a preliminary ruling would be condemned for violation of Article 6 ECHR. Ironically, due to domestic constitutional constraints on the separation of powers, governments would hardly be in a position to enforce any obligation to make a preliminary ruling request to the ECJ against a national judge. This negative result, as to the judicial protection of the person concerned, would be circumvented only if the Strasbourg Court could assess the compatibility of the EU act with the ECHR any time the applicant raised the preliminary ruling request before the national court. In other words, the condition of the exhaustion of internal remedies would be fictitiously considered as being fulfilled, once the individual made a plea to the national court to refer the issue to the ECJ.[98] In

98. De Schutter, op. cit. *supra* note 27, section 2.

any case, this seems quite a hypothetical argument, because the ECtHR has consistently decided with regard to the specificity of the Italian constitutional system that a preliminary reference to the supreme national court is not a remedy that needs to be exhausted.[99] Moreover, the admissibility of the application would depend on the applicant's request for a preliminary reference and would imply a burden upon the applicant. This is not the case in the solution suggested above.

7. Does the introduction of the mechanism require a revision of the EU Treaties?

It has often been argued that the prior involvement mechanism would require a prior revision of primary law. As a demonstration of this assumption, it is remarked that the ECJ would be seized not by a national court, as stipulated by Article 267 TFEU, but rather by the Commission or by one or more Member States, regardless of the fact that they are sued as defendants or co-defendants before the Strasbourg Court. This criticism is quite sharp, since it envisages a consequence that would clearly be at odds with the implications stemming from Article 6(2)TEU:[100] either a revision of primary law is implemented before accession or the mechanism is deleted. *Tertium non datur*.

However, this alleged incoherence of the prior involvement mechanism as currently envisaged seems too formalistic. Indeed, the consequences of seizing the ECJ implied by the mechanism should be considered against the broader picture of the ECJ case law. As is known, the Luxembourg Court upheld that an international agreement, concluded by the EU, may confer new competences on the institutions (including the ECJ), provided that international instrument does not alter the essential character of the powers attributed to the institutions by primary law.[101] Arguably, the prior involvement mechanism is a simple means of resuming a power originally

99. In the case *Immobiliare Saffi* v. *Italy* (Appl. No. 22774/93, judgment of 28 July 1999) the ECtHR observed that "in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention", para 42 ; Lock, op. cit. *supra* note 7, 792.

100. See *supra*, Introduction.

101. The ECJ endorsed that solution at least on two occasions: see in particular, Opinion 1/92, [1992] ECR I-2821, paras. 32 and 41; Opinion 1/00, [2002] ECR I-3493, paras. 20 and 21; Opinion 1/09, nyr, paras. 74–76. Cf. in the same sense Timmermans, op. cit. *supra* note 84, 8, while Tizzano, op. cit. *supra* note 32 seems quite cautious on this issue.

attributed to the ECJ – a power that it should have exercised in due course had the national court dealt with the case properly, or a question of validity had simply arisen before, allowing for a preliminary reference to the ECJ. Assuming that the Luxembourg Court resumes a power already granted to it by the current primary law, the different manner of seizing it does not entail the prior involvement mechanism altering the essential character of the powers attributed to the ECJ by the Treaties. In other words, it is here suggested that the prior involvement mechanism does not involve powers the ECJ does not have so far, given that Article 267 TFEU does cover the task provided for in that mechanism. In this perspective, by definition it cannot alter the power already conferred on the ECJ by the EU and FEU Treaties. It is stated in Article 19(1) TEU that the ECJ "shall ensure in the interpretation and application of the Treaties the law is observed". The prior involvement mechanism aims at ensuring that the accession agreement is consistent with the fundamental role the ECJ enjoys in the EU legal order. In that regard, the argument according to which the ECJ is seized in a different manner with respect to that laid down in Article 267 TFEU seems to take on merely ancillary importance. Moreover, if the Treaties allocate a primary judicial competence to the ECJ in the framework of a system of judicial remedies which has – as it is known – its own specificities, it does not seem necessary to amend the Treaties in order to ensure that that vital competence is effectively respected. After all, if the finalization of the EU accession requires several conditions to be met as laid down in Protocol No 8, on the contrary no primary law rule implies that accession requires a previous primary law revision in order to fulfil those conditions. The Draft, as it stands, seems to strike the right balance.

8. Conclusion

In conclusion, the prior involvement mechanism is consistent with the ECHR system and meets the conditions imposed by EU primary law for the accession process, while protecting individual rights at best. The prior involvement rule, as currently envisaged, does not require a revision of the EU Treaties. The mechanism is aimed at shaping a new relationship between the two Courts as the EU's accession to the ECHR – which appears as an obligation of means and not one of result – requires a new model for the relation between them. Indeed, it is likely that the rebuttable presumption doctrine, the so-called

equivalent protection principle once conceded by the ECtHR to the EU legal system,[102] will be dismissed once accession is finalized.[103]

Interestingly, the accession is deemed to have multifaceted implications for the EU legal order and for the Member States too. The full impact of the accession is however impossible to predict. Given the current EU role in a wide range of areas, it is possible to estimate that a workload for both the ECJ and the ECtHR would ensue. It could even turn out to be a matter of concern, since the issue of the respect of fundamental rights is not difficult to raise. Nevertheless the Institutions are committed to negotiate with the Council of Europe in order to meet several conditions so that accession may occur. It is against this background that it has been suggested above that the formula "shall accede" is not to be interpreted as a pure obligation to join.

The accession is expected to build another layer in the multi-level system of human rights protection currently ensured by the ECJ, the courts of the EU Member States (ordinary, supreme or constitutional), and the ECtHR. The relationship between the ECtHR and ECJ would not be shaped in hierarchical terms, as to which court is the supreme judicature for the protection of human rights,[104] along the lines of that currently existing between the national

102. In *M. & Co* v. *Germany*, the former Commission of Human Rights denied exercising judicial review over a purely national implementing measure of an EU act where the Member State had no discretionary power, as long as the EU provides for *equivalent protection* of fundamental rights (Appl. No. 13258, decision of 9 Feb. 1990, Decisions and Reports, 138). The outstanding precedent is the *Bosphorus* case in which the Strasbourg Court examined an alleged violation of the right to property since by the means of a national measure Irish authorities impounded, without compensation, an aircraft on the basis of a mandatory EU regulation which left no discretion to them. In practice, Ireland just fulfilled EU obligations. The Court construed the notion of *rebuttable* presumption: while reviewing the EU guarantees and procedural mechanisms, it accepted that the EU operates an equivalent standard of human rights protection and, as a result, there was no manifest deficiency in the instant case (*Bosphorus* v. *Ireland*, Grand Chamber, Appl. No. 450368/98, Judgment of 30 June 2005, 153). *Gasparini* v. *Italy and Belgium*, Appl. No. 10750/03, decision of 12 May 2009.

103. For it amounts to denying jurisdiction over EU law provisions as long as (*Solange*) an equivalent protection of human rights is ensured by the supranational system; arguably the Strasbourg Court would have no reasonable ground to reiterate it after accession. Accordingly, the *Solange-Method* (Lavranos, "Towards a Solange-method between international courts and tribunals?", in Brode and Shany (Eds.), *The Shifting of Authority in International Law, considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, 2008), p. 217) has been overcome by the Treaty of Lisbon. It might be worth recalling that the ECtHR recently decided not to apply the *Bosphorus presumption of equivalent protection* because of the decision of the *Conseil d'Etat* not to refer the question before it to the ECJ for a preliminary ruling and also due to the importance of the issue at stake, in the case *Michaud* v. *France*, Appl. No. 12323711, judgment of 6 March 2013 (final), paras. 105–115.

104. For a different approach, see Canor, "Primus inter pares – Who is the ultimate guardian of fundamental rights in Europe?", 25 EL Rev. (2000), 3.

supreme or constitutional courts and the ECtHR.[105] The ECJ's prior involvement mechanism encourages the *positive* intervention of the ECJ, while recognizing the subsidiary external control of the Strasbourg Court. It seeks to preserve the primary role of both Courts in their respective domains, on the assumption that the protection of human rights requires the two Courts to be not rivals for primacy, but rather *complementary partners for progressive evolution* in the interest of improving individual protection. This seems the intimate rationale for the prior involvement mechanism.

105. As suggested in 2003 by the European Parliament resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status, cited *supra* note 25, 436.

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INTERGENERATIONAL BALANCE, MANDATORY RETIREMENT AND AGE DISCRIMINATION IN EUROPE: HOW CAN THE ECJ BETTER SUPPORT NATIONAL COURTS IN FINDING A BALANCE BETWEEN THE GENERATIONS?

ELAINE DEWHURST*

1. Introduction

> "And I would like to speak to the elders, to those who have spent their lifetime working in this region, and well, I would like them to show the way, that life must change; when it is time to retire, leave the labour force in order to provide jobs for your sons and daughters. That is what I ask you. The Government makes it possible for you to retire at age 55. Then retire, with one's head held high, proud of your worker's life. This is what we are going to ask you... This is the 'contrat de solidarité' [an early retirement scheme available to the 55+ who quit their job]. That those who are the oldest, those who have worked, leave the labour force, release jobs so that everyone can have a job."[1]
>
> "In this respect a contentious issue that comes up in policy debates is the substitution of older for younger workers. It is often claimed that fewer jobs for older workers means more jobs for youth. This is based on the so-called 'lump of labour' fallacy that there are a fixed number of jobs and workers are perfectly substitutable for each other. In practice, younger workers cannot easily substitute older workers – the evidence suggests that early retirement policies have not generated jobs for younger age groups. There is also evidence that across the OECD there is a positive correlation between changes in employment rates for younger and older people."[2]

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1. Mauroy, French Prime Minister in Lille, France (27 Sept. 1981) quoted in Gaullier, *L'avenir à reculons: Chômage et retraite* (1982), p. 230.

2. Salazar-Xirinachs, Executive Director for Employment (ILO), "Promoting longer life and ensuring work ability" at UNECE (United Nations Economic Commission for Europe), Ministerial Conference on Ageing, Vienna, Austria (2012), 9–10.